UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TONY SANCHEZ,

Plaintiff,

-against-

I&A RESTAURANT CORP. (D/B/A EL ECONOMICO), FRANKLIN VARGAS, and MARILYN VARGAS,

Defendants.

14cv0726 (DF)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

DEBRA FREEMAN, United States Magistrate Judge:

In this action, which is before this Court on consent pursuant to 28 U.S.C. § 636(c), plaintiff Tony Sanchez ("Sanchez") seeks relief under the Fair Labor Standards Act ("FLSA) and the New York Labor Law ("NYLL") for the alleged failure of defendants I&A Restaurant Corp. d/b/a El Economico ("El Economico"), Franklin Vargas ("Vargas"), and Marilyn Vargas[1] (collectively, "Defendants"), to pay him overtime compensation and to provide required wage notices and wage statements.

Having conducted a bench trial in this action, this Court now makes final findings of fact and conclusions of law, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. With respect to Plaintiff's federal claim under the FLSA, this Court determines, based on the presented evidence and as discussed further below, that Plaintiff has not shown that Defendants are covered employers under the FLSA. Therefore, as a matter of law, the Court concludes that Defendants are not liable to Plaintiff under federal law. Given that this case has proceeded all

[1] As Marilyn Vargas did not testify at trial, "Vargas," as used singly herein, shall refer only to Franklin Vargas. Where the Court references both individual defendants together, it will, for clarity, refer to them as "Franklin and Marilyn Vargas."

the way through trial, however, this Court still finds it appropriate to reach Plaintiff's state-law claims, and concludes that Defendants are liable to Plaintiff for damages under the NYLL. Specifically, under the burden-shifting framework of the state law, this Court finds that Defendants have not met their burden of demonstrating that they paid Plaintiff overtime wages as required under the NYLL, and that Defendants are therefore liable for such unpaid wages, albeit in a lesser amount than that sought by Plaintiff. This Court also concludes that Defendants are liable to Plaintiff under the NYLL for failing to provide Plaintiff with required wage statements, for liquidated damages and interest as set forth below, and for reasonable attorneys' fees and costs.

BACKGROUND

On February 4, 2014, Plaintiff filed the Complaint in this action, asserting a number of claims under the FLSA and NYLL, each of which arose from Plaintiff's employment as a cook at El Economico, a restaurant owned and operated by Defendants and located in the Bronx, New York. (*See* Complaint, dated Feb. 4, 2014 (Dkt. 1).) In the Complaint, Plaintiff alleged, *inter alia*, that he regularly worked in excess of 40 hours per week without receiving overtime pay, that Defendants did not require him to record his hours, and that Defendants provided him with no documentation of his hours worked or rate of pay. (*Id.* ¶¶ 45-47, 54-59.)

This Court held a two-day bench trial in this action on November 23 and 24, 2015, at which time there remained to be tried claims for: (1) violations of the overtime provisions of the FLSA; (2) violations of the overtime provisions of the NYLL; (3) violations of the wage notice provision of the NYLL; and (4) violations of the wage statement provisions of the NYLL. (*See* Joint Pretrial Order, dated Aug. 10, 2015 (Dkt. 32) ("JPO").)

The parties stipulated before trial that Plaintiff had worked for Defendants from July 8, 2010, to December 31, 2013, and that each of the Defendants, including the individual defendants, Franklin and Marilyn Vargas, acted as Plaintiff's employer during that period.[2] (*Id.*, at 5; *see also* Transcript of Trial, conducted Nov. 23-24, 2015 ("Trial Tr.") (Dkts. 37, 39), at 5-6.) The evidence presented at trial focused on the following disputed issues: (1) the amount of El Economico's gross volume of annual sales, and, specifically, whether such sales met or exceeded $500,000 during each year of Plaintiff's employment, as is required for enterprise coverage under the FLSA; (2) the number of hours that Plaintiff worked during his employment with El Economico; (3) the amount of Plaintiff's compensation during his employment with El Economico; and (4) whether Plaintiff received required wage notices and wage statements.

DISCUSSION

I. BURDEN OF PROOF

In an action under the FLSA, the plaintiff bears the burden of proof as to the threshold issue of whether his employer is covered under the statute. *See Ethelberth v. Choice Sec. Co.*, 91 F. Supp. 3d 339, 353-54 (E.D.N.Y. 2015). A plaintiff seeking to recover unpaid minimum wages or overtime compensation under the FLSA also has the burden of proving "that he performed work for which he was not properly compensated." *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 361 (2d Cir. 2011) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)).

The FLSA, however, requires that employers be able to demonstrate their compliance with its provisions by maintaining adequate employee records. 29 U.S.C. § 211(c). Under the

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[2] Even when an employee is hired to work for an entity like a restaurant, certain individuals may also be considered to be the worker's "employer," under both the FLSA and NYLL, where such individuals, as a matter of economic reality, "possessed the power to control the workers in question." *Salinas v. Starjem Rest. Corp.*, 123 F. Supp. 3d 442, 463 (S.D.N.Y. 2015) (quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999)); *see also Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 940 (S.D.N.Y. 2013) (noting that, while the Second Circuit has not decided whether the standards for employer status are identical under the FLSA and NYLL, courts in this Circuit regularly apply the same tests under both statutes).

FLSA's implementing regulations, the employer must retain, for at least three years, any payroll records and either written employment agreements or memoranda summarizing the terms of oral employment agreements. 29 C.F.R. § 516.5. When an employer fails to comply with the FLSA's record-keeping requirements, the plaintiff may satisfy his burden of proof on his wage claims by producing evidence showing, as a matter of just and reasonable inference, the amount and extent of any work that he in fact performed, for which he was not properly compensated. *See Kuebel*, 643 F.3d at 361-62; *Chao v. Vidtape, Inc.*, 66 F. App'x 261, 265 (2d Cir. 2003). In this regard, the plaintiff may meet his initial burden under the statute "by relying on his recollection alone." *Yang v. ACBL Corp.*, 427 F. Supp. 2d 327, 335-36 (S.D.N.Y. 2005) (collecting cases).

The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. *Kuebel*, 643 F.3d at 362. "If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Id.* (quoting *Anderson*, 328 U.S. at 687-88); *see also Reich v. So. New England Telecomms. Corp.*, 121 F.3d 58, 66 (2d Cir. 1997); *Yang*, 427 F. Supp. 2d at 331-34; *Moon v. Kwon*, 248 F. Supp. 2d 201, 219 (S.D.N.Y. 2002).

New York law also imposes record-keeping requirements on employers. *See* 12 N.Y.C.R.R. § 142-2.6 (requiring employers to keep detailed records of employee wages and hours for six years). Under the NYLL, an employer's failure to maintain employment records or to provide wage statements to an employee operates to shift the applicable burden of proof. *See* N.Y. Lab. Law § 196-a ("Failure of an employer to keep adequate records or provide statements of wages to employees as required under this chapter . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements.”). Thus, in the absence of adequate records, the NYLL requires the *employer* to establish by a preponderance of the evidence that the plaintiff was properly paid for the hours he worked. *Yang*, 427 F. Supp. 2d at 337 n.15 (citing N.Y. Lab. Law § 196-a); *Padilla v. Manlapaz*, 643 F. Supp. 2d 302, 307 (E.D.N.Y. 2009).

In this case, the Court has been confronted with employers who maintained virtually no records regarding Plaintiff’s employment, including the number of hours he worked and the compensation paid for those hours; the only such records produced were copies of some checks (which concededly showed only a portion of Plaintiff’s pay, for only a portion of his employment), and timesheets for several work weeks in October and November 2013, the authenticity of which Plaintiff has disputed. Further, it is undisputed that Plaintiff had no written employment contract and that at least some portion of his wages was paid in cash throughout the duration of his employment. Under these circumstances, the Court must consider, with respect to Plaintiff’s FLSA claims, whether Plaintiff has satisfied his burden to establish FLSA coverage and, if so, to show the amount and extent of his work “as a matter of just and reasonable inference,” *Chao*, 66 F. App’x at 265, and, with respect to Plaintiff’s NYLL claims, whether Defendants have shown by a preponderance of the evidence that Plaintiff was properly compensated for the work he performed, *see Yang*, 427 F. Supp. 2d at 337 n.15.

II. FINDINGS OF FACT

At trial, Defendants introduced the following exhibits into evidence: tax returns for El Economico for the years 2010 to 2013 (Def. Ex. A1-A4); copies of checks that were paid by El Economico to Plaintiff from January 2011 to December 2013, as part of his weekly salary

(Def. Ex. B); copies of checks paid by El Economico to the New York State Child Support Processing Center, as a deduction from Plaintiff's wages for child support (Def. Ex. C); and weekly timesheets which were apparently prepared by Defendants and reflected Plaintiff's schedule for several weeks in October and November of 2013 (Def. Ex. D). Plaintiff also submitted this last document in connection with his direct case (*see* Pl. Ex. 1), although he disputed that his signature appeared on the timesheets and contended that the timesheets did not accurately reflect the hours that he worked during the time period to which they purported to relate (Trial Tr., at 40-41).

The Court also heard testimony at trial from a number of witnesses. Plaintiff testified on his own behalf, and Defendants called Yahaira Espinal ("Espinal"), the mother of two of Plaintiff's children; Ingry Rodriguez ("Rodriguez"), the accountant who prepared El Economico's tax returns; and defendant Vargas, one of El Economic's owners. This Court's factual findings, based on the evidence presented at trial, are set forth below.

A. El Economico Restaurant and Plaintiff's Job Duties

El Economico is a 40-seat restaurant located at 5589 Broadway, Bronx, New York. (*Id.*, at 9, 99, 213; *see also* JPO, at § vii, ¶ 4.) Although Plaintiff testified that the restaurant "sometimes" stayed open later on Fridays, for karaoke or parties (Trial Tr., at 14), the Court finds that, in general, for all years relevant to Plaintiff's claims, El Economico's operating hours were from either 6:00 or 7:00 a.m.[3] to 11:00 p.m., seven days per week (*see id.*, at 11, 14-15, 214). The restaurant has two floors; on the first floor are the kitchen, a counter area with a steam

[3] While the parties disputed the hour at which the restaurant opened to the public (with Plaintiff testifying that it opened at 6:00 a.m. (*id.*, at 11, 14), and Vargas testifying that it opened at 7:00 a.m. (*id.*, at 214)), the Court need not resolve this dispute, as it is immaterial to the resolution of Plaintiff's claims.

table where prepared food is placed, and a seating area, and on the second floor are the restrooms and another seating area. (*Id.*, at 238.) There is a door separating the kitchen, which is located in the rear of the restaurant, from the rest of the restaurant, and, as such, it is impossible to see El Economico's seating areas from inside the kitchen. (*Id.*, at 167, 238-39.)

In 2003, Plaintiff was hired by Mr. Rogelio, El Economico's previous owner, to work as a cook. (*Id.*, at 9-10.) Plaintiff's job duties in that position included preparing all individual orders, as well as bulk items that the restaurant needed to have on hand at all times, such as rice and beans. (*Id.*, at 9-11, 103, 179.) Franklin and Marilyn Vargas purchased El Economico in July 2010 (*id.*, at 5, 12), and Plaintiff kept the same position and responsibilities under the new ownership (*id.*, at 216). During the majority of the time relevant to Plaintiff's claims, El Economico also had two other cooks, Jonathan and Willie, who performed substantially the same job duties as Plaintiff. (*Id.*) At any one time, there was only a single cook working in El Economico's kitchen, but the cook was assisted by two "helpers." (*Id.*, at 180-81, 218-21.) Plaintiff's employment with El Economico terminated on December 23, 2013. (*Id.*, at 5-6.)

B. El Economico's Gross Sales Volume

To establish El Economico's gross volume of sales, Defendants introduced into evidence the restaurant's tax returns for each of the four years during which Plaintiff was in their employ. According to those tax returns, El Economico's gross volume of sales amounted to $84,432 in 2010 (Def. Ex. A1), $297,600 in 2011 (Def. Ex. A2), $207,658 in 2012 (Def. Ex. A3), and $269,501 in 2013 (Def. Ex. A4) – each well below the $500,000 annual threshold for coverage under the FLSA (*see infra* Section III(A)).

In an effort to demonstrate that El Economico underreported its income for these years, and that the restaurant's gross volume of sales actually met or exceeded the FLSA coverage threshold, Plaintiff testified as to his own purported knowledge of El Economico's volume of business. In doing so, Plaintiff attempted to establish both the average cost of "menu items" sold at El Economico and the average number of such items that he would prepare in a single day, thus inviting this Court to determine that, if this average sales volume were extrapolated over 365 days, El Economico would necessarily have sold more than $500,000 worth of goods. (Trial. Tr., at 48-75.)

Although this approach, in the abstract, could potentially have yielded information from which the Court could have drawn reasonable conclusions regarding El Economico's sales volume, Plaintiff's testimony – both with respect to the average cost of items on El Economico's menu and the average number of such items sold – was frustratingly vague, confusing, and inconsistent. Worse, Plaintiff displayed an obvious tendency to exaggerate any fact that he seemed to perceive could help him, and a combativeness towards opposing counsel when challenged. Over the course of the trial, he also showed an unwillingness or inability to provide cogent, responsive answers to many of the questions he was asked, whether by his own counsel, opposing counsel, or the Court itself, as it struggled to make sense of his testimony. In the end, as discussed further below, the Court has found Plaintiff's testimony regarding El Economico's sales volume to be lacking in credibility and utterly insufficient to enable the Court to draw any rational estimate of El Economico's gross annual sales.

1. Average Cost of Menu Items

As a preliminary matter, this Court notes that, at trial, Plaintiff did not place any El Economico menu, from any year (even the current menu, for comparison purposes) before the Court, and he testified that he never actually had a menu in his possession. (*Id.*, at 196-97.) Instead, Plaintiff apparently relied on guesswork to establish the prices that he regarded as representative of typical customer orders. (*See id*., at 48-125.) Indeed, although Plaintiff gave testimony regarding "average prices" of lunch or dinner items (*id*., at 65-66), he never demonstrated that he was competent to give such testimony, and he eventually conceded, on cross-examination, that he "actually . . . [did not] know what the prices were because [he] wasn't involved in the pricing or the preparation of the menu" (*id*., at 193).[4]

Further, most of Plaintiff's testimony regarding his understandings of pricing – even if based on some familiarity with the menu – did not refer to typical meals, but rather, as noted above, to "menu items," and even after this Court repeatedly indicated that Plaintiff had not provided a satisfactory definition of the term "menu item" (*id*., at 49, 71-72, 114-18), Plaintiff failed to define that term with any degree of specificity. While Plaintiff's counsel proffered that a menu item should be defined as "a single item on the menu at El Economico, whether that be a combo or a lunch item" (*id*., at 73), such a definition would leave the Court with no ability to discern whether much of Plaintiff's testimony regarding "menu items" referred, for example, to "combo" meals with multiple components (*see, e.g.*, *id*., at 53, 72), or to main dishes, such as chicken, steak, or lobster (*see, e.g.*, *id*., at 64-65), or to side dishes like rice and beans (*see, e.g.*, *id*., at 261). If the answer is that any of these types of orders, which evidently varied in price (*see id*. at 261-62), constituted a "menu item," then the descriptor is of little to no value for the purpose of calculating the amount of El Economico's sales, at least in the absence of specific testimony establishing, even roughly, how many of each type of item were sold, on average, during a given time period at El Economico.

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[4] Although this testimony was elicited in response to a question about menu pricing in 2011 (*see id*.), the Court understands the response, in the context of Plaintiff's overall testimony, not to be limited to a particular year. Moreover, when asked whether Plaintiff "ha[d] anything to do with the pricing of menu items between July of 2010 and December of 2013," defendant Vargas credibly testified, "Never." (*Id*., at 263.)

Moreover, while Plaintiff's counsel, in post-trial briefing, has attempted to marshal the testimony given by Plaintiff regarding the "average" prices of breakfast, lunch, and dinner items on the menu for each of the years at issue, Plaintiff's testimony regarding such prices not only had obvious gaps,[5] but generally appeared to the Court to be highly unreliable. During most of his testimony, Plaintiff seemed entirely unwilling or unable to testify, with any specificity, as to which items were most commonly ordered at lunch or dinnertime, stating, for example, that, at lunchtime, the most commonly ordered items were "[r]ice, beans, chops, chicken, fish, steak. Everything. Everything." (*Id.*, at 65.) Then, to the extent Plaintiff did give testimony as to any "typical" meal item and its price, he appeared to distort reality in his favor. Specifically, it seemed to the Court that, of what was apparently a wide-ranging menu (with foods typically served at breakfast, lunch, and dinner all shown on a single menu, and all available all day (*see id.*, at 265)), Plaintiff consistently showed an inclination to highlight what common sense would suggest were the more expensive items, and then deem them average. When asked, for instance, for "examples of dinner items" served at El Economico, Plaintiff chose to select "[g]ood cuts of steak, sirloin steak." (*Id.*, at 65.) Plaintiff then deemed a steak a "typical" dinner item at the restaurant, and priced it from $21.00 in 2010 to $25.75 in 2013. (*Id.*, at 65-66.) In contrast, when Vargas was asked by the Court if there were "particularly popular items that a lot of people tended to order at dinnertime," Vargas credibly described dishes of "[r]ice, beans, and roast meat," and further explained that "roast meat" referred to a stew, made from chicken or meat – a dish that was priced from $5.75 to $6.75 during the years in question. (*Id.*, at 264-65.)

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[5] *See, e.g.*, Plaintiff's Proposed Findings of Fact and Conclusions of Law, dated Feb. 5, 2016 ("Pl. Proposed Findings") (Dkt. 46), ¶ 14 (setting forth purported average lunch price in 2010, but not for any other year).

In all, Plaintiff provided very little, if any, believable testimony regarding the average prices of meal orders typically placed during any given hours of the day, at El Economico.

2. Average Number of Meal Items Sold Over a Given Period

Compounding the difficulties with his testimony described above, Plaintiff seemed unable to quantify, with any consistency or even coherence, the number of "menu items" that he (together with assistant cooks whom he observed in the kitchen) typically prepared over the course of a day. When asked, for example, how many menu items he observed being prepared "on a typical day," he began his answer by stating "80 percent," and when the question was then clarified to explain "[t]hat wasn't asking for a percent. It was asking for how many menu items," he responded, "Almost all of them." (*Id*., at 119-20.) Similarly, when asked, "Are you able to estimate for different years how many meals you cooked," Plaintiff responded, "Many. Many. When we got orders, for example, someone from outside came, they would ask for two servings of rice, three different servings of chicken in the oven, salad, roast chicken. Different, many things. Many things." (*Id*., at 117-18.)

When Plaintiff's counsel tried to ask Plaintiff to estimate, from the totality of the "items" he cooked, the percentages that were "lunch items," and the percentage that were "dinner items," Plaintiff's responses were equally vague and obviously overstated. For example, when Plaintiff was asked what percentage of the dishes on the menu in 2010 he would characterize as "lunch items," he responded, "[a]ll of them" (*id*., at 75), but when he was asked what percentage of the menu items that he prepared in 2010 consisted of "dinner items," he responded, "85, 90 for dinner" (*id*., at 101). When then asked for the percentage of his output that consisted of dinner items in 2011, he responded, "[a] lot," and, when pressed for a percentage, he answered, "90, 100. It was all of them." (*Id*.) When asked what percentage of dinner items he produced in

2012, he responded, "75, 80, 90." (*Id.*, at 106). Finally, when asked for the "percentage of [his] output of menu items at El Economico in 2013 [that he] would . . . estimate were dinner items versus lunch or breakfast items," Plaintiff answered, "For dinnertime, it was more. Dinnertime, we're at 85, 90 percent, 100. At lunchtime, 60." (*Id.*, at 110.) None of this enabled the Court to have a clear understanding of the approximate number of items (in particular price ranges) that were ordered over the course of a typical day, during any year at issue.

Further, except for that last-quoted answer, which appeared to draw a distinction between "lunchtime" and "dinnertime" at the restaurant, Plaintiff was also generally unwilling to accept or acknowledge the distinctions that even his own counsel tried to draw in that regard. (*See, e.g.*, *id.*, at 62-65, 101-13.) While Vargas credibly testified that El Economico was busier from 12:00 to 2:00 in the afternoon (which Vargas described as lunchtime) and from 5:00 to 7:00 in the evening (which he described as dinnertime), than at other times of the day (*id.*, at 236), Plaintiff repeatedly insisted that El Economico was busy "[a]ll the time," "[e]very day," and that the "entire time [wa]s busy" (*id.*, at 50-51), such that there was no ebb and flow of customers during any periods of the day (*see id.*, at 103-04). Common sense dictates that this testimony was not plausible, and, indeed, Plaintiff at one point seemed to retreat from this position, testifying that, during the years from 2010 to 2012, the restaurant became filled to maximum capacity on Thursdays through Sundays starting at about 6:00 or 7:00 p.m. (*id.*, at 123-24), and, in 2013, starting at about 4:00 or 4:30 p.m. (*id.*, at 125). This additional testimony, though – while at least more plausibly suggesting that not all times of day typically drew the same number of customers – suggests yet another type of exaggeration.

Essentially, Plaintiff seemed to maintain that every single seat in the restaurant was filled, from early evening to closing time, every single Thursday, Friday, Saturday, and Sunday. (*Id.*, at

123-25.) When asked, on cross-examination, to clarify if the restaurant was busier on those days than on other days, Plaintiff then testified, "Monday and Wednesday – of course all of the days were busy. But nevertheless, Monday could have been very busy because there is no particular day, Wednesday could have been very busy because any day could be busy. In fact, it could have been busy from Wednesday on." (*Id.*, at 176-77.) Here, the Court notes that Plaintiff was employed as a cook, and that he admitted that he could not see the restaurant's seating areas while he was cooking. (*See id.*, at 178.) Nonetheless, Plaintiff insisted that he was always aware of how full the restaurant was because additional chores he performed (like taking food to the "steam area," and purportedly delivering food to customers), as well as trips to the restroom, provided him with vantage points from which he could regularly see the entire facility. (*See id.*, at 177-78.) According to Plaintiff, regardless of the fact that the parties had stipulated that the restaurant only had 40 seats, he personally observed 45 to 50 people in the restaurant at any given time. (*Id.*, at 122; *see also id.*, at 181 (Q. "[You were] [c]ooking for a restaurant which you say was full of 40 people at all times?" A. "More.").)

Even apart from whether Plaintiff was actually competent to testify to the number of customers seated in the restaurant on a typical day, the Court finds that his assertions in this regard were inflated and not worthy of belief. On this point, the Court also notes that Vargas not only disputed that Plaintiff had the ability to view the restaurant's seating areas during his workday (*see, e.g.*, *id.*, at 239 (testifying that neither the first, nor the second floor of the restaurant can be viewed from the kitchen, and that the cooks "never" served the food to customers)), but also testified credibly that there were always tables at El Economico that were not occupied (*id.*, at 263).

At bottom, the Court finds that, through his testimony, Plaintiff has not provided any reasonable basis from which the Court could estimate the numbers of orders placed on a typical day, or in a particular year, at El Economico. Thus, even if this Court were to accept Plaintiff's proposed methodology for examining Defendants' volume of sales, this Court would be unable, based on Plaintiff's testimony, to utilize that methodology to make any reliable estimates of sales volume. The Court cannot extrapolate from the price of any allegedly representative "menu item" in order to arrive at El Economico's average daily sales, where Plaintiff has not even provided a workable definition of such an "item." Nor can the Court extrapolate based on the number of meals prepared or number of customers in the restaurant at any given time, where Plaintiff has offered no reliable, non-speculative basis for determining what those numbers were, and where it appeared to this Court that, in any event, Plaintiff was prone to exaggeration.

Overall, given the content of Plaintiff's testimony, as well as his demeanor on the witness stand, this Court finds that Plaintiff did not testify reliably or credibly regarding El Economico's gross volume of sales. By contrast, the Court finds that Vargas, who seemed to exhibit candor throughout his testimony, testified credibly that he reported "every dollar that El Economico . . . earned between 2010 and 2013" to his accountant, Ingry Rodriguez ("Rodriguez"). (*Id*., at 240.) For her part, Rodriguez testified in a straightforward and credible fashion that she had determined El Economico's gross sales volume, for each relevant year, by personally reviewing the bank statements and cash reports for El Economico, and then using these documents to calculate the business's income and expenses. (*Id*., at 81-85, 90-95.)[6] Although Rodriguez's

[6] For the years 2010 and 2011, Rodriguez testified to her understanding that the restaurant did not accept credit cards, but that the cash earnings of the business were reflected in the bank statements, as all cash received by the business was deposited. (*See id*.) For the years 2012 and 2013, when the restaurant did accept credit cards, Rodriguez explained her

analysis was reliant on documents supplied to her by Defendants (*id.*, at 95-97), Plaintiff has offered no specific, credible evidence indicating that this documentation was inaccurate or incomplete. This Court therefore finds, as a matter of fact, that the tax returns accurately reflect the gross sales volume of El Economico for each year of Plaintiff's employment.

C. Plaintiff's Hours

Plaintiff testified that, when he was first hired to work at El Economico in 2003, he was scheduled to work every day except Tuesday, from 1:00 p.m to 11:00 p.m., at which time the restaurant closed. (*Id.*, at 9-11.) When Franklin and Marilyn Vargas took over the business in July of 2010, Plaintiff continued to work the same schedule. (*Id.*, at 15.) According to Plaintiff, however, he never stopped working exactly at 11:00 p.m. each night, notwithstanding the fact that the restaurant was closed to customers at that time. (*Id*. at 15, 18.) Instead, Plaintiff testified that he would stay behind after El Economico had emptied, in order to clean the restaurant, organize the kitchen, and prepare food for the next day. (*Id.*, 15, 17-18.) Plaintiff estimated that, on average, he spent between an hour and 30 minutes to an hour and 45 minutes performing such work, such that he usually left the restaurant between 12:30 a.m. and 12:45 a.m. (*Id.*, at 20-22.) Although Plaintiff testified somewhat confusingly that he would leave work at that time "every day" and also "[g]enerally, from Wednesday on" (*id.*, at 22), this Court understands Plaintiff to have testified that he typically worked six days per week from 1:00 p.m. until 12:30 or 12:45 a.m., for an average of about 69 hours per week, between July 8, 2010, and December 2010.

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understanding that the credit-card income was reflected in the bank statements, and that cash was then separately recorded in the cash reports. (*Id.*, at 91-95.)

Plaintiff further testified that, in January 2011, his hours changed, in that he was scheduled to begin work at 2:00 p.m., rather than 1:00 p.m. (*Id.*, at 23.) Plaintiff continued to be scheduled until 11:00 p.m. each night that he worked, but he maintained at trial that he still never left the restaurant by that time. (*Id.*, at 23, 25.) Instead, Plaintiff testified that, generally, he would leave work at about 1:00 a.m., even later than he had left work before the change in his schedule. (*Id.*, at 25.) According to Plaintiff's testimony on direct examination, he then continued to work an average of about 66 hours per week – from 2:00 p.m. to 1:00 a.m., Wednesday through Monday – for the duration of his employment with El Economico. (*Id.*, at 23-25.) During cross-examination, however, Plaintiff contradicted himself on this point and stated that, at some point, he began working five days per week, rather than six. (*Id.*, at 154 ("[My pay] also went down further . . . because instead of working six days, I was working five days.") Upon further questioning, Plaintiff indicated that this change in his schedule did not go into effect until December 2013, the last month of his employment with El Economico. (*Id.*)

Two of Defendants' witnesses provided testimony which contradicted Plaintiff's recounting of the hours that he worked during his employment with El Economico. First, Defendants called Espinal, who, as noted above, is the mother of two of Plaintiff's children, and who lived with Plaintiff from August 2010 until about June 2011. (*Id.*, at 162, 170.) Espinal displayed a calm demeanor on the stand; she exhibited no tendency to evade questioning; and this Court had no cause whatsoever to question her credibility. Espinal testified that, during the time that she lived with Plaintiff, Plaintiff worked at El Economico six days per week, with Tuesday being his day off. (*Id.*, at 163.) She further testified that Plaintiff would start work at 2:00 p.m. each day, and that he would arrive home between 11:00 and 11:15 p.m. each night. (*Id.*, at 163-64.)

Also in contradiction to Plaintiff's testimony, Vargas testified that, when he first took over the business from its prior owner, Plaintiff had been working a shift that started at 2:00 p.m. (*id.*, at 218), rather than at 1:00 p.m., as Plaintiff contended (*see id.*, at 11). Vargas further testified that he allowed Plaintiff to continue to work on his prior schedule – from 2:00 p.m. to 11:00 p.m., six days per week – until Vargas was informed by the Department of Labor that certain of El Economico's employment practices were unlawful. (*Id.*, at 218.) At that time, he testified, Plaintiff's schedule changed, in that he began to work from 3:00 p.m. to 11:00 p.m., for five days per week. (*Id.*, at 215-18.) Although Vargas did not at first recall exactly when he was visited by the Department of Labor, he stated during cross-examination that he began paying his employees by check shortly thereafter. (*Id.*, at 278.) As the first of these checks that was retained by Vargas was dated January 5, 2011 (*see* Def. Ex. B), it appears that the change in Plaintiff's schedule occurred no later than the beginning of 2011.

Vargas further testified that Plaintiff's schedule changed one more time, after one of the restaurant's other cooks stopped working at El Economico. (Trial Tr., at 232-34.) After the change, Plaintiff ceased to work from 3:00 p.m. to 11:00 p.m. each day, and instead worked from 7:00 a.m. to 3:00 p.m. on Mondays and Tuesdays, from 12:00 p.m. to 8:00 p.m. on Wednesdays and Thursdays, and from 3:00 p.m. to 11:00 p.m. on Fridays. (*Id.*, at 233.) Although Vargas's recollection of when that change was implemented conflicts with the weekly timesheets introduced into evidence (*id.*, at 233; Pl. Ex. 1), that conflict is immaterial, in that, either way, Plaintiff would have worked the same number of total hours during the period in question.

As for the question of whether Plaintiff actually left the premises of the restaurant when his shift was scheduled to end at 11:00 p.m., or stayed later to clean the premises or for other reasons as he claimed, Vargas testified that, when he took over the restaurant in 2010, he

(Vargas) would stay at the restaurant every day until it closed at 11:00 p.m. (*Id.*, at 214.) He also testified that he was the one who locked the premises at night by pulling down a grate, and that he did so at 11:00 p.m. (*Id.*, at 214-15.) Vargas credibly testified that, during all of the years at issue in this case, he never required employees to stay at the restaurant past 11:00 p.m. (*id.*); that cleaning activities, like mopping the floor, would begin before 11:00 p.m. (*id.*, at 269); and that, if anything still needed to be done in the restaurant after that time, he alone would stay to do it, after pulling down the grate and closing the premises to both the public and employees (*id.*, at 269-71). On cross-examination, Vargas explained that, if he did personally stay at the restaurant past 11:00 p.m., he would leave through a back door, and that no one stayed behind with him, "because [he] was the one who closed it, and [he] had the keys." (*Id.*, at 271.)

In sum, Vargas admitted that Plaintiff initially worked in excess of 40 hours per week, in that he worked an average of 54 hours per week between July 8, 2010, and the end of December 2010, but maintained that Plaintiff's schedule was modified in January 2011, so that he worked five eight-hour shifts per week, for a total of 40 hours per week, from that time until the end of Plaintiff's employment in December 2013. Overall, this Court finds Vargas's testimony on the subject of Plaintiff's hours to be credible and consistent with Espinal's separate, unequivocal testimony that, during the period for which she had personal knowledge, Plaintiff worked only until his shift ended, at 11:00 p.m. The Court also notes that the testimony given by Vargas regarding a change in Plaintiff's work-week from six days to five (*id.*, at 218) was consistent with Plaintiff's eventual concession on that point (*id.*, at 154).

In light of this Court's assessment of the witnesses' credibility, this Court makes the following findings of fact with respect to Plaintiff's hours: (1) from July 8, 2010, until December 31, 2010, Plaintiff worked from 2:00 p.m. to 11:00 p.m., six days per week, for a total of 54 hours per week; and (2) from January 1, 2011 until December 23, 2013, Plaintiff worked from 3:00 p.m. to 11:00 p.m., five days per week (or another schedule consisting of five eight-hour shifts), for a total of 40 hours per week.

D. Plaintiff's Compensation

Plaintiff testified that, when Franklin and Marilyn Vargas first acquired the restaurant on July 8, 2010, they began to pay him $540 per week, entirely in cash. (*Id.*, at 26.) During the period between July 8, 2010 and December 2010, Vargas paid Plaintiff every Sunday, but provided Plaintiff with no documentation of his earnings or explanation of his method of payment. (*Id.*, at 26-28.) Plaintiff further testified that, in January 2011, he began to be paid only half of his salary in cash, with the other half being paid by check. (*Id.*, at 28.) Despite this change in the method of payment, Plaintiff continued to be paid $540 per week. (*Id.*, at 28-29.)

Plaintiff further testified that, at the same time that Defendants began to pay him partially by check, Defendants also began to deduct taxes and child support from the check component of his pay. (*Id.*, at 33-34, 36.) Defendants did not, according to Plaintiff, make any deductions from the cash component of his compensation. (*Id.*, at 36.) Plaintiff also testified that, for the duration of his employment with El Economico, he did not receive any document along with his weekly pay explaining these deductions or otherwise setting forth how his wages were calculated. (*Id.*, at 35-36.) For tax purposes, however, Plaintiff was provided with a W-2 form at the end of the year showing the total amount that had been deducted from his annual pay. (*Id.*, at 37.)

According to Plaintiff, there was one final change in his compensation when, after he asked for a raise, Defendants began to pay him at a rate of $105 per day. (*Id.*, at 29.) At first, Plaintiff testified that this raise was implemented in "[a]pproximately July 2011, 2012." (*Id.*, at 30.) Upon being asked whether he could provide any more specificity, Plaintiff stated that he did not remember the month of the raise, and that it could have occurred in either 2011 or 2012. (*Id.*, at 31.) Later, on cross-examination, Plaintiff estimated that he first asked for the raise in January 2011, and that he eventually received it in about March 2011. (*Id.*, at 146.) Plaintiff further testified that Vargas continued to pay him partially by check and partially by cash after this pay increase. (*Id.*, at 32.)

The testimony that Plaintiff gave during cross-examination, however, suggests that he never received such a raise. For instance, Plaintiff first testified that he received $270 in cash per week in both January 2011, when he was receiving $540 per day, and October 2013, after his pay had purportedly been increased. (*Id.*, at 143-44.) Later, however, Plaintiff repeatedly contradicted this testimony, stating first that he received $280 in cash per week after his March 2011 raise (*id.*, at 147), then testifying that he, in fact, received over $300 in cash per week after this pay increase (*id.*, at 153). When Defendants' counsel pointed out these inconsistencies, Plaintiff claimed, for the first time, that his pay had actually varied from week to week. (*Id.*, at 154.)

Given Plaintiff's original testimony that the cash portion of his salary had always remained constant, Defendants' counsel also inquired as to why, if Plaintiff had received a raise in March 2011, the amount paid to him by check did not change after that date. (*Id.*, at 146.) Plaintiff answered, "Because he told me that he was going to give me the raise but that I should wait for it because he had a lot of debts." (*Id.*) Following this nonresponsive answer, Defendants' counsel repeated the question, and Plaintiff again responded evasively, stating, "They discounted [sic] the taxes from my check. They deducted child support . . . [and] gave me the remainder in cash in the amount of [$280]." (*Id.*, at 147.) Plaintiff never provided any explanation as to why there would be no variance in the check amounts if the amount of his pay had indeed changed, and if the cash component had remained the same. (*Id*., at 143-44, 146-48.)

For his part, Vargas testified that he began paying Plaintiff $540 per week, in cash, when Vargas first took over El Economico (*id*., at 222), and that the amount of Plaintiff's weekly pay did not change at all following the January 2011 change in his schedule (*id*., at 235-36). Vargas specifically denied that he had ever increased Plaintiff's pay to $105 per day, and maintained that Plaintiff was paid $540 per week for the entirety of the time that he was employed by Defendants. (*Id*.) Although Vargas stated that, in January 2011, he began to provide Plaintiff with payment receipts each week at the time that his wages were paid (*id*., at 247-48), Vargas did not contend that Plaintiff was ever given documentation setting forth his rate of pay, deductions, gross and net wages, or any other information regarding the basis for his weekly salary, nor were any documents containing this information introduced into evidence. On the issue of Plaintiff's compensation, as with the other disputed issues in this case, this Court finds that Vargas testified more credibly than Plaintiff.

In light of this Court's credibility assessments, and based on the documentary evidence offered by Defendant to refute Plaintiff's assertions regarding his compensation, this Court finds that: (1) from July 8, 2010, to December 31, 2010, Plaintiff was paid $540 for 54 hours of work per week; and (2) from January 1, 2011, to December 23, 2013, Plaintiff was paid $540 for 40 hours of work per week. This Court further concludes that Defendant has not shown that Plaintiff was provided with notice or other documentation regarding his pay and its method of calculation, either at the time that Defendants acquired the business, or at the time that he received his wages each week.

III. CONCLUSIONS OF LAW

A. Applicability of FLSA to Plaintiff's Employment

An employee is covered by the minimum wage and overtime provisions of the FLSA only if he or she, in any workweek, is: (1) "engaged in commerce or in the production of goods for commerce;" or (2) "employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. §§ 206(a), 207(a)(1); *see also Jia Hu Qian v. Siew Foong Hui*, No. 11cv5584 (CM), 2012 WL 1948820, at *1 (S.D.N.Y. May 30, 2012). "These two categories are commonly referred to as 'individual' and 'enterprise' coverage, respectively." *Jacobs v. N.Y. Foundling Hosp.*, 577 F.3d 93, 96 (2d Cir. 2009). As Plaintiff stipulated on the record that he is not alleging individual coverage under the FLSA (Trial Tr., at 128-29), the applicability of the FLSA to Plaintiff's employment depends on whether El Economico was an "enterprise engaged in commerce or in the production of goods for commerce" during the period of Plaintiff's employment. 29 U.S.C. §§ 206(a), 207(a)(1).

Under the FLSA, an "enterprise engaged in commerce or in the production of goods for commerce" is an entity that (1) "has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person;" and (2) "whose annual gross volume of sales made or business done is not less than $500,000 . . . ." *Id.* § 203(s)(1)(A)(i-ii). Defendants have stipulated to the fact that its employees work with goods or materials that have been moved in commerce (Trial Tr., at 129), and the applicability of enterprise coverage in this action therefore depends on whether its gross volume of sales met or exceeded the $500,000 threshold during the relevant period of time. As set forth above (*see* *supra* Section I), Plaintiff bears the burden of establishing this element of his FLSA claims; *see also Ethelberth*, 91 F. Supp. 3d at 353-54.

Although an employer's tax returns are not necessarily determinative as to the amount of a business's gross volume of sales, *see, e.g.*, *Chang Mei Lin v. Yeh's Bakery, Inc.*, No. 12-CV-2146 (JG), 2013 WL 867436, at *3 (E.D.N.Y. Mar. 7, 2013) (finding, on motion for summary judgment, that employee's sworn statement that employer grossed more than $2,000 per day on average created a material issue of fact as to whether the employer grossed more than $500,000 in sales annually), here, Plaintiff has failed to provide other credible evidence capable of establishing Defendants' gross volume of sales to any reasonable degree of certainty. As the gross sales volumes specified in El Economico's tax returns for each year of Plaintiff's employment do not meet or exceed the threshold amount required for enterprise coverage under the FLSA (*see* Def. Ex. A1-A4), and as Plaintiff has not shown, by adequate alternate proof, that these tax returns inaccurately reflect El Economico's gross volume of sales, this Court concludes that Plaintiff has not carried his burden of establishing FLSA coverage. Accordingly, Plaintiff's FLSA claims against Defendants are hereby dismissed.

B. Exercise of Supplemental Jurisdiction Over Plaintiff's NYLL Claims

Under 28 U.S.C. § 1367, in any civil action in which a district court has original jurisdiction, it "shall" also, with limited exceptions, "have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). "A court 'may decline to exercise supplemental jurisdiction,' however, if, among other factors, . . . 'the district court has dismissed all claims over which it has original jurisdiction.'" *Kroshnyi v. U.S. Pack Courier Servs., Inc.*, 771 F.3d 93, 102 (2d Cir. 2014) (quoting 28 U.S.C. § 1367(c)). As this Court has disposed of Plaintiff's FLSA claims (the only claims over which this Court had original jurisdiction), the question remains as to whether this Court should continue to exercise supplemental jurisdiction over Plaintiff's state law claims.

Where all of the federal claims in an action have been dismissed, a court must consider whether continuing to exercise supplemental jurisdiction over any remaining state law claims "serves the interests of economy, convenience, fairness and comity." *Bray v. City of New York*, 356 F. Supp. 2d 277, 285 (S.D.N.Y. 2004) (citing *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 446-47 (2d Cir. 1998)). Generally, if a court dismisses before trial all of the claims over which it has original jurisdiction, the balance of these factors will weigh in favor of declining to exercise supplemental jurisdiction over any remaining state law claims. *See Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)). By contrast, declining to exercise supplemental jurisdiction may not serve the relevant interests "when the dismissal of the federal claim occurs late in the action, after there has been substantial expenditure in time, effort, and money in preparing the dependent claims." *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 56 (2d Cir. 2004) (internal quotation marks and citation omitted). For that reason, there is a "particularly strong case for retaining jurisdiction . . . [after a court] has not only spent considerable time dealing with the legal issues and becoming fully conversant with the fact but *also* has conducted a trial on the merits." *Id.* (internal quotation marks and citation omitted).

Applying the factors of judicial economy, convenience, fairness, and comity, this Court concludes that Plaintiff's NYLL claims should not be dismissed on jurisdictional grounds at this late stage of the litigation. These claims involve a relatively straightforward application of the NYLL's minimum wage, overtime, wage notice, and wage statement provisions, rather than novel or complex issues of state law that would implicate concerns about comity. *See Chenensky v. New York Life Ins. Co.*, 942 F. Supp. 2d 388, 395 (S.D.N.Y. 2013). Further, given that this Court has already conducted a trial on the merits, the factors of convenience and judicial economy weigh strongly in favor of this Court's continued exercise of supplemental jurisdiction. Accordingly, this Court concludes that it should retain jurisdiction over Plaintiff's pendent state-law claims.[7]

C. Statute of Limitations Under the NYLL

Under New York law, the limitations period applicable to violations of the state's minimum wage and overtime requirements is six years. *See* N.Y. Lab. Law §§ 198(3), 663(3); *see also Marshall v. UBS Fin. Servs., Inc.*, No. 14cv4384 (JGK), 2015 WL 4095232, at *4 (S.D.N.Y. July 7, 2015) ("The statute of limitations for a violation of the NYLL is six years."). In this case, the parties agree that Plaintiff was already employed at El Economico on July 8, 2010, when Franklin and Marilyn Vargas acquired the business, and that he continued to work for the restaurant until December 23, 2013. (Trial Tr., at 5-6.) As Plaintiff filed his Complaint

[7] Nothing herein, however, should be construed as approval by this Court of the manner in which Plaintiff's counsel litigated this particular action. Having been presented, at an early stage of the case, with tax returns showing that El Economico's gross volume of sales was several hundred thousand dollars below the threshold for FLSA coverage in each of the relevant years, Plaintiff's counsel nonetheless continued to maintain that the evidence was likely to show actual sales volumes adequate to implicate the FLSA. At trial, however, Plaintiff did not come close to meeting his burden of demonstrating that the threshold for FLSA coverage was satisfied. Under the circumstances, this Court has some concern that counsel either did not adequately investigate the viability of Plaintiff's FLSA claims, or asserted and proceeded on those claims primarily for the purpose of obtaining and maintaining federal jurisdiction over this action, and not because Plaintiff actually had good-faith evidentiary support for his assertion that El Economico had annually grossed more than $500,000 in sales. Although this Court is inclined to give Plaintiff's counsel the benefit of the doubt here (considering that counsel was faced with a difficult client, who tended to exaggerate), counsel is reminded of its professional obligation to investigate its clients' claims with reasonable diligence before asserting them, and to question its clients with care before maintaining claims that may appear facially insufficient based on evidence provided by opposing parties.

on February 4, 2014 (*see* Dkt. 1), less than six years after he began working for Defendants, the entirety of his employment for Defendants occurred within the limitations period applicable to his NYLL claims.

D. Damages Under the NYLL for Unpaid Overtime Wages

Under the NYLL, an employee must be paid a minimum wage, *see* N.Y. Lab. Law § 652; *see also* 12 N.Y.C.R.R. §§ 146-1.2, and, for each hour an employee works in excess of 40 hours in a given work week, the employee must be compensated at the rate of one and one-half times the employee's regular hourly rate, *see* 12 N.Y.C.R.R. § 146-1.4. For the periods relevant to this action, the statutory minimum wage in New York State was $7.25. *See Yong Kui Chen v. Wai Yin Chen*, 615 F. App'x 10, 13 (2d Cir. 2015) (citing N.Y. Lab. Law § 652(1)) ("New York's minimum wage rate, like the federal rate, increased to $7.25 on July 24, 2009."). If an employee is not paid on an hourly basis, his or her regular hourly rate is "calculated by dividing the employee's total weekly earnings, not including exclusions from the regular rate, by the lesser of 40 hours or the actual number of hours worked by that employee during the work week." *See* 12 N.Y.C.R.R. § 146-3.5.

1. July 8, 2010 to December 31, 2010

As set forth above, this Court finds that, from July 8, 2010, until December 31, 2010, Plaintiff typically worked from 2:00 p.m. to 11:00 p.m., five days per week, for a total of 54 hours per week. (*See supra* Section II(C).) The Court further finds that, during that period, Plaintiff was paid at a rate of $540 per week. (*See supra* Section I(D).) Thus, Plaintiff's regular rate of pay during that period was $13.50 per hour (*i.e.*, $540 ÷ 40 hours), and he should have been compensated at the rate of $20.25 per hour ($13.50 × 1.5) for any overtime. *See* 12 N.Y.C.R.R. § 146-3.5.

Given that Plaintiff's regular rate of pay exceeded the minimum wage applicable during this time period, Plaintiff has no claim here for violation of the NYLL's minimum-wage requirement. Plaintiff does have a meritorious claim, however, for unpaid overtime, as, between July 8, 2010, and December 31, 2010, Plaintiff worked 14 hours in excess of 40 hours per week, and Defendants failed to pay him for those hours at a rate of time and one-half. Plaintiff's lawful weekly pay for this period – with the first 40 hours compensated at the base rate of $13.50 per hour, and the remaining 14 hours compensated at the overtime rate of $20.25 per hour – would have been $823.50, which is $283.50 more than the $540 he actually received. As the period between July 8, 2010, and December 31, 2010, totaled 25 weeks, Plaintiff is entitled to $7,087.50 in damages ($283.50 × 25) for unpaid wages relating to that period.

2. January 1, 2011 to December 23, 2013

With respect to Plaintiff's claims for unpaid wages for work he performed between January 1, 2011, and December 23, 2013, this Court finds that Plaintiff is not entitled to any damages. This Court has determined that Plaintiff worked for only 40 hours per week during this period of time (*see supra* Section II(C)), and, based on the same calculation set out above, his regular rate of pay for this period was $13.50 per hour. As this exceeded the statutory minimum wage at that time, Plaintiff has no viable minimum-wage claim. Further, as his hours did not exceed 40 hours per week, Plaintiff was not denied overtime pay during this period.

Accordingly, Defendants have satisfied their burden of demonstrating by a preponderance of the evidence that Plaintiff was properly paid for the work that he performed between January 1, 2011 and the termination of his employment with El Economico, and any wage claims asserted by Plaintiff under the NYLL for this period are hereby dismissed.

E. Liquidated Damages Under the NYLL

In an action to recover unpaid wages under the NYLL, a plaintiff is also entitled to recover liquidated damages equal to "one hundred percent of the total . . . underpayments found to be due" for work performed from April 9, 2011, forward. *See Angamarca v. Pita Grill 7 Inc.*, No. 11cv7777 (JGK) (JLC), 2012 WL 3578781, at *8 (S.D.N.Y. Aug. 2, 2012) (quoting N.Y. Lab. Law § 663(1)), *report and recommendation adopted*, (Dec. 14, 2012). Prior to April 9, 2011, though, the NYLL allowed for a plaintiff to recover only 25 percent of his unpaid wages as liquidated damages. *See id.*; *see also Najnin v. Dollar Mountain, Inc.*, No. 14cv5758 (WHP), 2015 WL 6125436, at *2 (S.D.N.Y. Sept. 25, 2015) ("Prior to April 9, 2011, [NYLL] liquidated damages were calculated at 25 percent of the lost pay. From April 9, 2011 forward, these state damages are set at 100 percent of unpaid wages.").

These liquidated damages are recoverable "unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." N.Y. Lab. Law § 198(1-a). "To establish the requisite subjective 'good faith,' an employer must show that it took 'active steps to ascertain the dictates of the [NYLL] and then to comply with them.'" *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 150 (2d Cir. 2008) (quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999)); *see also Garcia v. JonJon Deli Grocery Corp.*, No. 13cv8835 (AT), 2015 WL 4940107, at *5 (S.D.N.Y. Aug. 11, 2015) (noting that there is no substantive difference between the state and federal good faith standards). This burden is "a difficult one," and liquidated damages are the norm, rather than the exception. *Barfield*, 537 F.3d at 150 (quoting *Herman*, 172 F.3d at 142).

In this case, Vargas testified that he was unaware that certain of El Economico's employment practices were unlawful at the time that he first acquired the restaurant (Trial Tr., at

241-42), but he gave no indication that he actually sought to ascertain what the law required or that he took active measures to ensure that he complied with the NYLL. Consequently, Defendants have not met their burden of demonstrating that they possessed a good faith basis to believe that their underpayment of wages was in compliance with the law, and Plaintiff is therefore entitled to liquidated damages under the NYLL. As the entirety of the period for which Plaintiff has established his entitlement to unpaid wages falls before April 9, 2011, his liquidated damages are calculated at 25 percent of those unpaid wages. Accordingly, Plaintiff is entitled to recover $1,771.88 (25% of $7,087.50) in liquidated damages.

F. Wage Notice and Wage Statement Provisions Under The NYLL

1. Wage Notices

New York's Wage Theft Prevention Act ("WTPA") is an amendment to the NYLL that became effective on April 9, 2011. *See Inclan v. New York Hosp. Grp., Inc.*, 95 F. Supp. 3d 490, 500 (S.D.N.Y. 2015). Pursuant to the version of the WTPA that was applicable at the time of Plaintiff's employment with El Economico, employers were required to provide their employees with a written wage notice "at the time of hiring, and on or before February first of each subsequent year of the employee's employment with the employer." N.Y. Lab. Law § 195(1)(a) (eff. April 9, 2011 to Feb. 27, 2015). The wage notice was required to be "in English and in the language identified by each employee as the primary language of such employee," *id.*, and was required to contain the following information:

> (1) the rate or rates of pay and basis thereof; (2) allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; (3) the regular pay day designated by the employer; (4) the employer's name; (5) any 'doing business as' names used by the employer; (6) the physical address of the employer's main office or principal place of business, and a mailing address if different; (7) the employer's telephone number;

> and (8) such other information as the commissioner deems material and necessary.

Salinas v. Starjem Rest. Corp., 123 F. Supp. 3d 442, 474 (S.D.N.Y. 2015) (citing N.Y. Lab. Law § 195(1)(a) (footnote omitted). Prior to February 27, 2015, "the WTPA entitled employees to recover statutory damages for wage notice violations of $50 per work week, not to exceed $2,500." *Baltierra v. Advantage Pest Control Co.*, No. 14cv5917 (AJP), 2015 WL 5474093, at *11 (S.D.N.Y. Sept. 18, 2015); *accord Inclan*, 95 F. Supp. 3d at 502; *see also* 2010 N.Y. Laws ch. 564 § 7, *amending* N.Y. Lab. Law § 198(1-b).

"The plain language of the statute," however, "confer[red] a private right of action only upon those [employees] who [did] not receive their notice at the time of hiring, but not upon those who [did] not receive it on or before February first of any subsequent year." *Guan Ming Lin v. Benihana New York Corp.*, No. 10cv1335 (RA) (JCF), 2012 WL 7620734, at *8 (S.D.N.Y. Oct. 23, 2012), *report and recommendation adopted*, 2013 WL 829098 (Feb. 27, 2013). For that reason, an employee hired before April 9, 2011, may bring a cause of action for failure to provide an annual wage notice only if his or her wage changed after April 9, 2011, and his or her employer failed to provide a compliant wage notice after that change in wage. *See Perez v. Platinum Plaza 400 Cleaners, Inc.*, No. 12cv9353 (PAC), 2015 WL 1881080, at *4 (S.D.N.Y. Apr. 24, 2015) ("[T]hose hired before April 9, 2011[] may recover for weeks that they did not receive a wage notice when their wage rate changed after April 9, 2011.") (citing *Cuzco v. F & J Steaks 37th St. LLC*, No. 13cv1859 (PAC), 2014 WL 2210615, at *4 (S.D.N.Y. May 28, 2014)); *Yuquilema v. Manhattan's Hero Corp.*, No. 13cv0461 (WHP) (JLC), 2014 WL 4207106, at *11 (S.D.N.Y. Aug. 20, 2014) (noting that, while there is no discernable reason why the statute should not treat the failure to provide notice at the date of hire differently than the failure to provide notice in subsequent years, the plain language of the statute clearly prohibits recovery by a plaintiff who commenced employment prior to April 9, 2011, even if he did not receive adequate notice in years after that date), *report and recommendation adopted*, 2014 WL 5039428 (S.D.N.Y. Sept. 30, 2014); *see also Gold v. N.Y. Life Ins. Co.*, 730 F.3d 137, 143-44 (2d Cir. 2013) (holding that the WTPA does not apply retroactively).

Given that Plaintiff was hired before the WTPA took effect on April 9, 2011, and that this Court has determined that Plaintiff's wage rate did not change at any time after that date, Plaintiff is ineligible for recovery under the WTPA's wage notice provision. Accordingly, the Court concludes, as a matter of law, that Plaintiff is not entitled to receive any damages for Defendants' failure to provide written wage notices, and Plaintiff's wage-notice claim is hereby dismissed.

2. Wage Statements

In addition, beginning April 9, 2011, the WTPA required employers to

> 'furnish each employee with a statement with every payment of wages, listing the following' information: (1) the dates of work covered by that payment of wages; (2) the employee's name; (3) the employer's name, address, and telephone number; (4) the rate or rates of pay and basis thereof; (5) gross wages; (6) deductions; (7) allowances, if any, claimed as part of the minimum wage; and (8) net wages.

Salinas, 123 F. Supp. 3d at 475 (quoting N.Y. Lab. Law § 195(3)); *see also Baltierra*, 2015 WL 5474093, at *11. Prior to February 27, 2015, *i.e.*, during the covered periods relevant to this action, "the WTPA entitled employees to recover statutory damages for violations of the wage statement requirement of $100 per work week, not to exceed $2,500." *Baltierra*, 2015 WL 5474093, at *10; *accord Inclan*, 95 F. Supp. 3d at 501; *see also* 2010 N.Y. Laws ch. 564 § 7, amending N.Y. Lab. Law § 198(1-d).

As the NYLL provides for an independent right of action to recover such statutory damages, *see Ayala v. Looks Great Servs., Inc.*, No. 14-CV-6035 (ADS) (SIL), 2016 WL

3541548, at *3 (E.D.N.Y. June 23, 2016) ("As part of the WTPA amendments, the Legislature for the first time created a private right of action for employees to recover damages against their employers for failure to provide them with proper wage statements."); *Kone v. Joy Constr. Corp.*, No. 15cv1328 (LTS), 2016 WL 866349, at *5 (S.D.N.Y. Mar. 3, 2016) ("A private right of action to recover penalties for violations of Section[] . . . 195(3) is provided by Section[] . . . 198(1-d) of the Labor Law."), an employee may obtain statutory damages for violations of the wage-statement requirement regardless of whether his or her employer committed any minimum wage or overtime violations during the weeks at issue.

Here, as Defendants have not met their burden of proving that they ever provided Plaintiff with any documentation regarding his pay or its method of calculation (*see supra* Section II(D)), Defendants are liable to Plaintiff under the WTPA for their failure to provide the required wage statements. Plaintiff worked for Defendants for 141 weeks after April 9, 2011, and his statutory damages of $100 per work week therefore exceed the $2,500 damages cap in place under the WTPA. Thus, the Court concludes that Plaintiff is entitled to recover damages for violation of the WTPA's wage statement provision in the maximum amount of $2,500.

G. Prejudgment Interest

"It is well settled that in an action for violations of the [FLSA] prejudgment interest may not be awarded in addition to liquidated damages." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1064 (2d Cir. 1988). By contrast, the NYLL permits a plaintiff to recover both liquidated damages and prejudgment interest. *See, e.g.*, *Fermin v. Las Delicias Peruanas Rest., Inc.*, 93 F. Supp. 3d 19, 48 (E.D.N.Y. 2015). "This dual availability occurs because New York State views liquidated damages as punitive, and not compensatory, such that pre-judgment interest is not a duplicative damages award." *Id.* at 48 (explaining that the purpose of liquidated damages under the NYLL is to "constitute a penalty" on an employer's willful withholding of wages due, while the purpose of pre-judgment interest is "to compensate a plaintiff for the loss of use money"); *see also Janus v. Regalis Const., Inc.*, No. 11cv5788 (ARR) (VVP), 2012 WL 3878113, at *8-9 (E.D.N.Y. July 23, 2012) ("[A]n employee recovering under the NYLL is entitled to prejudgment interest since NYLL liquidated damages are punitive in purpose."), *report and recommendation adopted*, 2012 WL 3877963 (Sept. 4, 2012).

Prejudgment interest is calculated only on the unpaid wages due under the NYLL, however, and not on an award of liquidated damages or any statutory penalties. *See Mejia v. East Manor USA Inc.*, No. 10-CV-4313 (NG), 2013 WL 3023505, at *8 n. 11 (E.D.N.Y. Apr. 19, 2013) (citing *Janus*, 2012 WL 3878113, at *8); *see also Tackie v. Keff Enterprises LLC*, No. 14cv2074 (JPO), 2014 WL 4626229, at *5-6 (S.D.N.Y. Sept. 16, 2014) (calculating prejudgment interest on unpaid wages, but not on penalties for violation of NYLL's wage notice provision); *Maldonado v. La Nueva Rampa, Inc.*, No. 10cv8195 (LLS) (JLC), 2012 WL 1669341, at *11 (S.D.N.Y. May 14, 2012) ("Prejudgment interest applies only to the amount of compensatory damages, and excludes the amount of liquidated damages."), *report and recommendation adopted*, (Aug. 9, 2012).

"Pursuant to [New York] state law, a successful plaintiff may receive prejudgment interest at a rate of nine percent per year." *Najnin*, 2015 WL 6125436, at *4; N.Y.C.P.L.R. § 5001, 5004. As to the date from which interest should be found to run, "Section 5001(b) sets forth two methods of calculating prejudgment interest." *Alvarez v. 215 N. Ave. Corp.*, No. 13cv049 (NSR) (PED), 2015 WL 3855285, at *3 (S.D.N.Y. June 19, 2015) (adopting report and recommendation).

> First, interest may be calculated from 'the earliest ascertainable date the cause of action existed,' N.Y. C.P.L.R. § 5001(b).

> However, '[w]here . . . damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.' *Id.*

Id., at *3. It is within the Court's "'wide discretion'" to "'determin[e] a reasonable date from which to award prejudgment interest.'" *Id*. (quoting *Conway v. Icahn & Co.*, 16 F.3d 504, 512 (2d Cir. 1994)).

In this case, this Court has determined that Plaintiff is entitled to compensatory damages for unpaid wages for the period between July 8, 2010, and December 31, 2010. In exercising its "wide discretion," *id*., this Court finds that the accrual of prejudgment interest should run from October 4, 2010, the midpoint of that period. Accordingly, the Court concludes that Plaintiff is entitled to prejudgment interest on the sum of $7,087.50, calculated at a rate of nine percent per annum, from October 4, 2010, until the date of entry of the judgment in this action.

CONCLUSION

For all of the foregoing reasons:

1. Defendants are entitled to judgment in their favor dismissing the following claims against them, with prejudice:

   a. Plaintiff's claims under the FLSA;

   b. Plaintiff's claims under the NYLL for unpaid wages and liquidated damages for the period from January 1, 2011 to December 23, 2013; and

   c. Plaintiff's claim for violation of the wage-notice provision of the WTPA, N.Y. Lab. Law § 195(1)(a).

2. Plaintiff is entitled to judgment in his favor against Defendants, jointly and severally, in the following amounts:

   a. $7,087.50 as damages under the NYLL for unpaid overtime wages for the period from July 8, 2010 to December 31, 2010;

   b. $1,771.88 as liquidated damages under the NYLL;

c. $2,500 for violation of the WTPA's wage-statement provision, N.Y. Lab. Law § 195(3);

d. prejudgment interest on the sum of $7,087.50, to be calculated by the Clerk of Court at the rate of nine percent per annum, from October 4, 2010, until the date of entry of judgment; and

e. reasonable attorneys' fees and costs, in an amount stipulated by the parties or, if necessary, to be determined by the Court based on a fee application to be submitted by Plaintiff no later than September 16, 2016.

Plaintiff is directed to submit a proposed judgment to the Court, in accordance with the Court's determinations.

Dated: New York, New York
August 15, 2016

SO ORDERED

DEBRA FREEMAN
United States Magistrate Judge

Copies to:

All counsel (via ECF)